IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MELINDA ELEM, Petitioner.	)	2 CA-CR 2007-0335-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20032505

Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

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By Joy Athena
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V Á S Q U E Z, Judge.

¶1 Following a jury trial, petitioner Melinda Elem was convicted of conspiring to commit three felonies: first-degree murder and aggravated assault of one victim and manslaughter of that victim's unborn child. She was also convicted of transferring a narcotic drug. The trial court sentenced her to life in prison without the possibility of release for twenty-five years for the conspiracy conviction and to a concurrent, mitigated three-year term for the narcotics conviction. This court affirmed the convictions and sentences on appeal. *State v. Elem*, No. 2 CA-CR 2004-0179 (memorandum decision filed Aug. 26, 2005). Elem sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., claiming her trial counsel had been ineffective. The trial court summarily denied relief, and this petition for review followed. We will not disturb the ruling unless the trial court abused its discretion in denying relief. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 In her petition below, Elem asserted that trial counsel had been ineffective for three reasons. First, he had failed to request a jury instruction on conspiracy to commit second-degree murder as a lesser-included offense of conspiracy to commit first-degree murder and had, "in essence," opposed the state's motion for such an instruction. Second, she alleged, he had failed to request an "anti-*Pinkerton* jury instruction," based on *State ex rel. Woods v. Cohen*, 173 Ariz. 497, 844 P.2d 1147 (1992), in which our supreme court rejected the liability doctrine explained in *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946). And third, trial counsel had failed to convey a plea offer to her.

¶3 As the trial court correctly noted in its minute entry denying post-conviction relief, a defendant is not entitled to relief from a conviction based on a claim of ineffective assistance of counsel unless he or she is able to establish that counsel's performance was both deficient, based on prevailing professional norms, and prejudicial, that is, the outcome of the case would have been different but for the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Regarding the two jury instruction issues, the trial court found Elem had failed to establish either prong of the *Strickland* test. For the following reasons, we conclude the trial court did not abuse its discretion in denying relief on these portions of Elem's ineffective-assistance-of-counsel claim.

¶4 In her petition below, Elem argued extensively that conspiracy to commit second-degree murder is a cognizable, lesser-included offense of conspiracy to commit first-degree murder and that trial counsel's failure to request a lesser-included-offense instruction based on second-degree murder, and his opposition to the state's request for such an instruction, were based on counsel's misapprehension of the law rather than on trial strategy. She contends in her petition for review that the trial court "assumed" the omitted instruction "would have been lawful." We need not address these arguments, however, because the trial court did not abuse its discretion in finding that Elem had suffered no prejudice from counsel's action or inaction.

¶5 The same judge who presided over the trial decided Elem's petition for post-conviction relief and, at trial, had denied the state's motion for the instruction Elem claims was warranted. There is no indication in the record that the court would have granted the state's motion had Elem's counsel not opposed it or that the court would have given a lesser-included instruction had the request come from defense counsel. In denying post-conviction relief, the trial court determined that, even assuming it were theoretically possible to conspire to commit second-degree murder, there was no factual predicate for such an instruction given the evidence in Elem's case.

¶6 "A party is entitled to an instruction on any theory of the case *reasonably supported by the evidence*." *See State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983) (emphasis added).

> The test for whether an offense is a lesser-included offense is, whether the offense is, by its nature, always a constituent part of the greater offense, or whether the charging document describes the lesser offense even if it is not always a constituent part of the greater offense. A lesser-included offense instruction must be given if the jury could rationally find that the state failed to prove the distinguishing element of the greater offense.

State v. Price, 213 Ariz. 550, ¶ 6, 145 P.3d 647, 649 (App. 2006) (internal citations omitted), *vacated in part on other grounds*, 217 Ariz. 182, 171 P.3d 1223 (2007). The distinguishing element between first- and second-degree murder is premeditation. A.R.S. §§ 13-1104, 1105; *see also State v. Thompson*, 204 Ariz. 471, ¶ 23, 65 P.3d 420, 426 (2003).

¶7 Elem has not provided us with the trial transcripts in conjunction with this petition for review, but her own recitation of the evidence supports the trial court's ruling. As she concedes, the evidence showed that Elem had asked a friend if the friend knew anyone who would kill the unborn child of her husband's former girlfriend. The friend relayed Elem's request to an undercover police detective, who posed as the would-be killer, and recordings of Elem's conversations with the detective were admitted into evidence. Elem contends that, based on those recorded conversations, the jury could have found that Elem had conspired to have the unborn child killed, but the death of the mother was "merely a foreseeable result" of the object of the conspiracy. But Elem's conversations with the detective, as described in her petition for review, show overwhelmingly that, although Elem's initial or even primary goal was to have the unborn child killed, she understood and agreed that that would be achieved by killing the mother. Hence, no reasonable jury could have found that the state had failed to prove Elem had premeditated the death of the mother. *See* A.R.S. § 13-1101(1) ("'Premeditation' means that the defendant acts with either the intention or the knowledge that he [or she] will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection.").

¶8 Regarding Elem's second claim, based on counsel's failure to request the "anti-*Pinkerton*" instruction, Elem failed to show either deficient performance or prejudice. *Pinkerton* involved co-conspirator liability for substantive offenses committed beyond the offense of conspiracy itself by another member of the conspiracy. 328 U.S. at 641-47; *see*

also State ex rel. Woods, 173 Ariz. at 500, 844 P.2d at 1150 ("Under *Pinkerton*, a conspirator may be held liable for a crime to which the conspirator never agreed, and which is committed by a co-conspirator with whom the conspirator never personally dealt, as long as the crime is reasonably foreseeable and is committed in furtherance of the conspiracy."). In this case, the undercover officer with whom Elem conspired committed no offenses in furtherance of the conspiracy. Thus, any form of "anti-*Pinkerton*" instruction would have been inappropriate and meaningless to the jury, and the trial court did not abuse its discretion in denying relief on this claim.

¶9 We also conclude the trial court did not abuse its discretion by summarily denying relief on Elem's third claim of ineffective assistance based on counsel's alleged failure to convey a plea offer. Elem contends she presented sufficient evidence to warrant an evidentiary hearing on the issue. We disagree. A trial court may "'summarily dismiss a petition for post-conviction relief only if it determines that no "material issue of fact or law . . . would entitle [the petitioner] to relief."'" *State v. Donald*, 198 Ariz. 406, ¶ 8, 10 P.3d 1193, 1198 (App. 2000), *quoting State v. Ketchum*, 191 Ariz. 415, 416, 956 P.2d 1237, 1238 (App. 1997), *quoting* Ariz. R. Crim. P. 32.6(c). "To establish deficient performance [of counsel] during plea negotiations" and "achieve a hearing on such a claim, a defendant must present more than a conclusory assertion that counsel failed to adequately communicate a plea offer." *Donald*, 198 Ariz. 406, ¶¶ 16-17, 10 P.3d at 1200. "A petitioner need not provide detailed evidence, but must provide specific factual allegations

that, if true, would entitle him to relief." *Id.* ¶ 17. "The constitutional principles underlying *Donald*," however, "come into play only when a concrete plea offer has been made by the state." *State v. Jackson*, 209 Ariz. 13, ¶ 11, 97 P.3d 113, 117 (App. 2004); *see also State v. Vallejo*, 215 Ariz. 193, ¶ 7, 158 P.3d 916, 918 (App. 2007) (refusing to "extend *Donald*'s reach" to include "potential" plea offers).[1] Moreover, Elem was required to present a colorable claim for both prongs of the *Strickland* test for ineffective assistance of counsel—deficient performance and resulting prejudice.

¶10 Elem supported her claim by attaching a document from trial counsel's file, containing counsel's notation that the prosecutor "is not offering much of a plea at this time." Elem also submitted her own affidavit stating no plea offer had ever been conveyed to her but that, had she been offered a plea including "a sentencing range less than life imprisonment [she] would have accepted it." In response to Elem's petition, the state contended that no plea offer had ever been extended, arguing:

> Undersigned counsel spoke to trial counsel in preparing its response to this petition, however, at the time of this filing trial counsel was out of town. However, both the State and trial counsel agreed that a plea was never offered to the defendant. Although there was a note in defense counsel's file alluding to a plea, there was never a formal offer made to the defendant.

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[1]As we did in *Jackson* and in the majority opinion in *Vallejo*, we assume without deciding for the purposes of this petition that *Donald* was correctly decided. *See Vallejo*, 215 Ariz. 193, ¶ 7, 158 P.3d at 918; *Jackson*, 209 Ariz. 13, ¶ 11, 97 P.3d at 117. Therefore, we do not reach the issue of whether a viable claim of ineffective assistance of counsel may ever be based on the rejection of a plea offer. *See Vallejo*, 215 Ariz. 193, ¶¶ 10-17, 158 P.3d at 919-21 (Howard, J., concurring).

> The State and defense counsel simply discussed potential pleas, but never came to any agreement regarding an appropriate offer, and therefore no plea was ever drafted.

The trial court found that Elem had failed to show a plea offer had been made and had, thus, "failed to make a colorable claim [of] ineffective assistance of counsel on the grounds that a plea offer existed which Counsel failed to convey." We agree. Elem's claim is based entirely on an inference she has drawn from the note in trial counsel's file, an inference refuted by the state's assertion that no plea offer was ever extended to Elem. But even assuming some offer had been made, because there is no evidence in the note or elsewhere in the record of the details of an actual, concrete plea offer, she failed to allege sufficient facts that, if true, would have entitled her to relief. Thus, we find no abuse of discretion in the trial court's summary dismissal of her claim.

¶11 Although we grant review, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge